U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Date: April 27, 2000

Case No.: 1998-LHC-2881

OWCP No.: 07-128347

In the Matter of:

HENRY BROCK,
Claimant

against

AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

FRANK A. BRUNO, ESQ.
On behalf of the Claimant

CHRISTOPHER M. LANDRY, ESQ.
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "LHWCA" or "the Act"), 33 U.S.C. § 901, et seq., filed by Henry Brock ("Claimant") against Avondale Industries, Inc. ("Avondale" or "Employer"). Claimant seeks benefits for hearing loss allegedly caused by noise exposure. A formal hearing was held in accordance with the Administrative Procedure Act, 5 U.S.C. § 500, et seq., in Metairie, Louisiana on August 13, 1999. All parties were given a full opportunity to present evidence and argument pursuant to the Act and its accompanying regulations.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. The date of injury was August 3, 1992;

2. Claimant became aware of the relationship between his employment and hearing loss on October 31, 1992;

3. Employer was advised of the hearing loss on December 28, 1992;

4. Notices of Controversion were filed on December 29, 1992, February 24, 1993, and September 13, 1994;

5. An informal conference was held July 16, 1998;

6. Audiograms were performed by Mr. Daniel Bode on August 3, 1992, and on March 8, 1999;

7. Claimant's employment status is retired;

8. The applicable average weekly wage is $173.60;

9. No compensation or medical benefits have been paid.

ISSUES

The parties listed the following issues as disputed on the joint stipulation:

1. Whether the hearing loss occurred in the course and scope of employment;

2. Whether Claimant was exposed to workplace noise which could have caused the hearing loss;

3. Whether an employer/employee relationship existed at the time of the hearing loss.

---

[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and EX-__ for Employer's exhibits.

The parties also listed the following specific issues as unresolved:

1. Causation;

2. [Noise] exposure while employed at Avondale;

3. Last responsible employer.

SUMMARY OF FACTS

I. Claimant's Employment

Claimant was 70 years old at the time of the hearing. (TX, p. 13). He completed school through the 8th grade, and he can read and write. (TX, p. 13).

A. Avondale

Claimant began working for Avondale in 1955. (TX, pp. 13, 19; see generally EX-3 (Avondale employment file)). He worked as a helper/tacker for approximately five years, including some work inside ships,[2] and was exposed to the "pretty" loud noise of chippers and grinders without hearing protection. (TX, pp. 14, 17, 70-71). Claimant said at some points the noise became so bad that he and his fitter would have to stand very close together to be able to converse. (TX, p. 18). This noise exposure continued the entire time Claimant worked for Avondale as a tacker. (TX, p. 15).

Claimant also worked for Avondale as a "burner," using both a "track torch" and a "hand torch." (TX, p. 16). Claimant sometimes did chipping as well if he could not find someone to do it for him. (TX, p. 16). Claimant said he was not constantly exposed to loud noises as a burner, but was "sometimes" exposed depending on the work going on around him at the time. (TX, pp. 16, 71). Claimant also worked doing "pre-fab," either on the side of the levee, or in front of "Shop 2." (TX, p. 17). Claimant could not recall how long he worked doing "pre-fab." (TX, p. 18).

Claimant left Avondale in 1966 for a job with Thibodaux Boiler Works. (TX, p. 19). Claimant returned to Avondale a few years later as a "burner," and worked another four years. (TX, p. 20). Claimant said he also worked as a fitter for Avondale, assembling pieces to be welded. (TX, p. 20). Claimant said there was "plenty of noise doing [fitting]," such as from striking metal pieces with a maul to make them fit together. (TX, pp. 20-21). Claimant said the noise was not constant, but "it depend[ed] where you was working at ...." (TX, p. 21).

Claimant said he was not provided hearing protection while he worked for Avondale. (TX,

[2] Claimant agreed he was helping to build ships and boats while at Avondale. (TX, p. 60).

p. 21). Claimant never asked for hearing protection, because he thought the company would offer protection if it was needed.. (TX, p. 21).

B. Other Employers

After leaving Avondale for the second time, Claimant worked for Thibodaux Boiler Works in 1973 as a burner building winches for offshore use. (TX, p. 23; CX-3, p.1). Thibodaux Boiler Works[3] was located in Thibodaux, Louisiana, but was not located near any body of water. (TX, p. 23). Claimant denied any noise exposure there because he performed his duties outside. (TX, p. 23).

C. Main Iron Works

After leaving Thibodaux Boiler Works in 1975, Claimant briefly worked for Main Iron Works (approximately two weeks) as a "burner." (TX, pp. 24-25; CX-3, p. 2; see generally EX-5 (Main Iron employment file)). Claimant initially testified he was helping to build boats at Main Iron Works ("Main Iron"), but he later said Main Iron did not actually build boats and was strictly fabrication, or "pre-fab." (Compare TX, p. 61, and pp. 65, 67). Claimant could not recall his supervisor's name. (TX, pp. 28, 65).

Mr. Leroy Molaison also testified at the hearing. Mr. Molaison has been president, general manager, and owner of Main Iron Works since 1986. (TX, p. 87). Mr. Molaison has been associated with Main Iron since 1961, and he has worked in all areas of its operations. (TX, pp. 87-88). He agreed that Main Iron's primary business is building tugs and inland push boats, and said Main's facility is located on the Intracoastal Waterway. (TX, p. 88). However, Mr. Molaison did not specifically remember Claimant. (TX, p. 99).

Mr. Norris Guidry also testified at the hearing. Mr. Guidry has worked for Main Iron for over 35 years in the fab shop and the drydocks. (TX, pp. 106-07; see also pp. 90-91). Mr. Guidry agreed that Main Iron builds and repairs tug boats and push boats. (TX, p. 106). In 1975, Mr. Guidry was a "pusher," or "working foreman," in charge of some of the work done inside the fabrication shop and in the adjacent "new construction area." (TX, pp. 91-92, 107). At that time, employees worked in crews under a particular supervisor. (TX, p. 96). Based on EX-5, Mr. Molaison agreed Claimant had worked under Mr. Guidry in 1975. (TX, p. 93).

Claimant denied he did any fitting at Main Iron. (TX, pp. 28, 65). Mr. Molaison explained that Main Iron classified its burners as "burner/fitters," and that burners and fitters were "basically" the same job. (TX, pp. 94, 105). Mr. Guidry also agreed that a burner and fitter were the same thing at Main Iron. (TX, p. 108). Curiously, when shown employment records from Main Iron (EX-5), Mr. Molaison could not point to any specific record indicating Claimant was a "burner/fitter." (TX,

[3] Thibodaux Boiler Works later became SMATCO. (TX, p. 23).

pp. 101-02).

Mr. Guidry explained that burner/fitters cut steel, assemble it, and tack it together with a few welds; welders later fully weld the joints together. (TX, p. 109). Mr. Molaison said a burner/fitter position has not changed much since 1975. (TX, p. 95). Workers use "basically" the same tools as in 1975, such as cutting torches, "comealongs," C-clamps, wedges, mauls, hammers, and center punches to mark materials. (TX, pp. 94-96). Mr. Molaison denied burner/fitters used "needle guns," or that "needle guns" were used in or around the fabrication shop. (TX, pp. 94, 99).

Claimant testified he usually performed his duties outside, approximately 20 feet in front of the fabrication shop, and usually with no one else working nearby. (TX, pp. 27, 64). However, Mr. Guidry said his crew primarily worked inside the shop, only working outside if "somebody needed some [workers] outside." (TX, p. 108; see also TX, p. 114). Although he admitted some of his crew could have worked outside, he said no crew member would have worked outside exclusively. (TX, p. 114). However, Mr. Guidry did not specifically recall Claimant, and said he would have no reason to doubt Claimant's testimony that he had worked outside the shop during his two weeks with Main Iron. (TX, p. 115). He admitted it was possible Claimant could have worked for another crew as well. (TX, pp. 114-15).

Mr. Guidry said Main Iron now has some "needle guns," but he does not think any were used before the 1980's. (TX, p. 110). Mr. Molaison agreed Main has some "needle guns," but denied Main Iron has ever had chipping guns, because its welders do all chipping by hand. (TX, p. 89; see also TX, p. 124). Mr. Guidry also denied that Main has chipping guns, explaining that burner/fitters use a chipping hammer or grinder to remove welding slag. (TX, pp. 110-11, 113). He said other workers might use chippers or hammers if their work required it, and such work would have gone on daily. (TX, p. 112). Mr. Molaison continued to deny air chippers were used at Main Iron even after he was confronted with a noise test listing noise levels near air chipping. (TX, p. 92). Mr. Molaison suggested that the tests may have referred to equipment used by shipowners performing their own repairs using Main Iron's dry docks. (TX, p. 93; see also TX, p. 124).

Claimant denied that chipping or grinding occurred frequently at Main Iron, explaining that in his experience, smaller shipyards do not bother to clean up welds like larger yards. (TX, pp. 61-62; see also TX, p. 66). Claimant acknowledged mauls might be used occasionally to remove slag from welds,[4] but said "you're not going to hear it much, not that." (TX, p. 62).

When asked if a shipfitter/burner would be exposed to the same kinds of noises today as in 1975, Mr. Molaison replied "basically, yes." (TX, p. 101). However, Claimant denied his work at Main Iron exposed him to loud noise. (TX, p. 26). Claimant does not remember the shop as noisy,

[4] A few moments later, Claimant denied that a maul could be used to remove slag from a weld. (TX, p. 63).

describing it as "kind of quiet." (TX, p. 28). He also said Main Iron was the quietest shipyard he ever worked at. (TX, p. 67). Mr. Molaison agreed that the area outside of the fabrication shop was a "quiet area of the shipyard," and in his opinion, there was "not really" any noise at Main Iron. (TX, p. 103). Claimant denied he ever used hearing protection at Main Iron. (TX, p. 64).

Mr. Molaison said Main Iron now has a hearing conservation program in place, although there is really no noise problem in the shipyard. (TX, p. 89). Mr. Molaison hired a safety consultant who took noise readings and found all readings to be "below the threshold." (TX, p. 89). Even so, Main requires workers to wear hearing protection in certain areas, such as where arc gouging[5] or other noisy work is taking place. (TX, p. 89).

D. Other companies

After leaving Main Iron, Claimant was hired by a contracting company, Payne & Keller, who performed maintenance work at various chemical plants. (TX, pp. 28-29; CX-3, p. 2). Claimant denied that his work for Payne and Keller was noisy. (TX, p. 30). Claimant also did similar work for Quinco, Fish Engineering, and Falcon (or Oil Occidental). (TX, pp. 30-32; CX-3, pp. 2-3). Claimant also worked for the Lafourche Parish Police Jury, cutting grass and performing general laborer duties. (TX, p. 31; CX-3, p. 5).

E. McDermott

Claimant began working for McDermott in 1976, first in the main yard, and then at the Bayou Black yard. (TX, p. 32; CX-3, p. 3). Claimant said he only worked for McDermott for a few months and could not recall the name of his supervisor. (TX, p. 34).

At the McDermott main yard, Claimant was a burner. (TX, p. 32). Claimant denied he did any work for McDermott other than burning. (TX, pp. 33, 57-58). Claimant used a torch, and other small tools typically carried by a fitter. (TX, p. 34). Claimant did not think the products he made were used in shipbuilding, but he said they may have been used in barge repair or for offshore work. (TX, pp. 32-33). Claimant never saw any ships at the McDermott main yard, and he admitted he was unsure whether barge repair work was done. (TX, p. 46). Although he never worked there, another McDermott employee, Mr. Autry Benoit, said the McDermott main yard built "big offshore structure or platforms;" he did not know whether the yard also built barges or boats as well. (TX, pp. 74-75). Later, Mr. Benoit denied any shipbuilding or shiprepairing was done. (TX, p. 86).

[5] Mr. Molaison explained arc gouging is done by welders once a module is complete and the vessel assembled on the launching ways, approximately 500 feet from the fabrication shop. (TX, pp. 98-99). Mr. Guidry said it was possible a little arc gouging was done in the fab shop, but he agreed it is primarily done once the entire boat is assembled. (TX, p. 112).

Claimant also worked at McDermott's Bayou Black pre-fabrication yard as a burner. (TX, pp. 50-51). Claimant said this facility was probably located next to a waterway, but if so, his work was well away from it. (TX, pp. 51-52). Mr. Benoit said this facility was located next to a waterway, Bayou Black. (TX, p. 79). Claimant admitted he saw some barges at the Bayou Black facility, but said his own work kept him "a long ways from there." (TX, p. 54).

Mr. Benoit testified he worked for McDermott at the Bayou Black yard for seven or eight years. (TX, pp. 74-75). Mr. Benoit was the structural fitting foreman in 1976, and Claimant worked for him as a structural fitter/burner.[6] (TX, p. 77). Mr. Benoit could not recall what other jobs besides burning and fitting Claimant may have done, and he could not recall how long Claimant worked for him. (TX, p. 79).

Claimant did not know what the pieces he burned at the Bayou Black yard were used for. (TX, p. 51). However, Mr. Benoit explained that the Bayou Black yard built "modules, and then the packing to the modules," for fixed oil platforms. (TX, pp. 76-77). Claimant worked building "small items," which were then incorporated into the modules. (TX, p. 80).

Claimant denied he ever participated in a "loadout," which apparently means loading the fabricated equipment on a barge for shipment to another location. (TX, pp. 52-53). Mr. Benoit also denied Claimant would have helped load pre-fab modules onto barges, because "we had particular people that do that loading and offloading stuff." (TX, p. 82). Mr. Benoit said it would have been very unlikely for Claimant to have gone aboard a barge. (TX, pp. 82-83). Mr. Benoit later said some of the "structural fitters" would load and unload barges, but he admitted he had no knowledge of Claimant actually participating in any loadouts. (TX, pp. 83-84).

Mr. Benoit recalled he and his men (including Claimant) working outside, "in the center part of the yard, away from the waterway," but not near any shops. (TX, p. 80). Mr. Benoit said most of the men in his crew worked a short distance apart, to allow them room to work. (TX, pp. 81-82). Fitters would use a torch, hand tools, hammers, wedges, and mauls; Mr. Benoit specifically denied they would have chipping hammers or chipping guns. (TX, p. 78). Mr. Benoit also denied that chipping hammers or guns were used in areas where fitters were working. (TX, p. 78). Later, he admitted the men would have used "a small chipping hammer ... a little small hand tool." (TX, p. 79).

Claimant denied that his work at McDermott was noisy. (TX, pp. 33, 73). Claimant also denied he ever saw anyone doing any grinding or chipping. (TX, p. 54). Claimant admitted there were other types of work and noise going on around him, including some welders and fitters. (TX, p. 47, 55). Claimant admitted he heard "all kind of noise" while working there, but said he did not hear any chipping or grinding because he was only there for a short time. (TX, pp. 48, 50).

---

[6] Mr. Benoit said if Claimant had worked at the main yard, he would have worked for another foreman, and he would not know how Claimant's work was different. (TX, p. 83).

Claimant was never required to wear hearing protection when working in either McDermott facility. (TX, p. 56). Claimant did not notice any signs warning of high noise. (TX, p. 56). Mr. Benoit said McDermott now requires hearing protection, but he could not say when this requirement was implemented. (TX, p. 75). Mr. Benoit said he wore hearing protection at the Bayou Black facility "especially if I go in the shops," but he denied ever wearing hearing protection when outside in the yard. (TX, pp. 84-85). Mr. Benoit did not know whether it was a company requirement to wear protection around the outside work. (TX, p. 85).

F. Later Employers

After leaving McDermott, Claimant worked for Armay Construction Company, performing work similar to the chemical plant maintenance work he had done previously. (TX, pp. 34-35). Claimant also worked for Lafourche Construction Company cutting grass on the levees, and for Harmony Corporation Louisiana Maintenance Service, performing chemical plant maintenance and construction. (TX, p. 35). Claimant denied he was exposed to noise at any of these jobs. (TX, p. 35).

In 1982 Claimant worked for Seismic Services as a helper on a small boat, helping to prepare and drill test holes for use in later seismic testing. (TX, pp. 37-39, 58). These tests were made over water, primarily over inshore inlets and lakes. (TX, p. 72). Claimant described the boat as a small aluminum pontoon, approximately 16 feet long, with a 20 horsepower engine. (TX, pp. 58-59). Claimant said drilling was quiet, using a battery powered drill. (TX, p. 59). Claimant was not involved with the actual testing process, which apparently involved the use of explosives. (TX, p. 39). Claimant denied he was exposed to any noise during this employment. (TX, p. 39).

Claimant worked for Supreme Contractors in 1983, and later for Kenway Construction, building "board roads" for access to land based drilling rigs. (TX, pp. 40-41). Again, Claimant denied any noise exposure. (TX, p. 40). He also worked for the Board of Commissioners for Lafourche Basin, cutting grass along the levees. (TX, pp. 40-41; see also EX-6, 7). Claimant also worked for Fluor Daniel, again performing maintenance work on chemical plants; Claimant denied any noise exposure. (TX, pp. 41-42). Claimant retired in 1991 due to unrelated health problems, and has not worked since. (TX, pp. 42-43).

II. Audiograms and Noise Testing

A. Noise Testing

Mr. Victor McElroy testified at the hearing. Mr. McElroy owns On-Site Training, and is a consultant for various companies. (TX, p. 116). He was hired as a consultant by Main Iron in 1996,

and he performs safety inspections, environmental inspections, training, safety meetings, and represents the company in dealings with regulatory agencies. (TX, p. 117). As part of his work, he monitors noise levels at Main Iron. (TX, p. 118).

Mr. McElroy said that after he was hired he examined Main Iron's hearing conservation program and modernized it somewhat, but he noted the program was already in place. (TX, pp. 118-19). As part of this program, he identified particularly noisy areas with short-term noise levels above 85 decibels (dB),[7] where hearing protection would be required. (TX, p. 119). Likely activities where protection might be required included needle gunning, air chipping, and arc gouging. (TX, p. 119). However, he said Main was not required to undergo "metric testing ... because of the low noise levels they have there." (TX, p. 119). He said overall levels were lower because in new ship construction there is less need to "beat parts together;" it is more profitable to simply cut the parts to the correct size and weld them together. (TX, p. 120).

Mr. McElroy's 1996 testing was performed using a digital noise level indicator. (TX, p. 125). He said testing standards merely require that test equipment be accurate, and in his own testing he found this equipment to be accurate to within one decibel. (TX, p. 125). Mr. McElroy's results provide both peak levels ("Decibels High") and average levels ("Decibels Low," used for OSHA standards, etc.). (TX, p. 126; EX-5, p.1). The average noise level in most areas of the yard is listed as "Back," which Mr. McElroy explained meant background noise levels were less than 85 dB, which he considers insignificant. (TX, p. 126, EX-5, p. 1). Only two tested locations averaged above 85 dB, in the engine room and at the door to the engine room (presumably aboard a vessel under construction). (TX, p. 126).

Mr. McElroy explained that under OSHA regulations, peak levels are irrelevant (unless over 140 dB); what is focused on is the length of exposure at a particular average noise level. (TX, pp. 126-127). If exposure is less than 130 dB for less than a certain time period, audiometric testing is not required and hearing protection must only be provided for use while doing that particular job. (TX, p. 127). For instance, Mr. McElroy said that if noise levels are less than 100 dB (or can be reduced to less than 100 dB through the use of protection, a man is allowed to work up to four hours exposed to that noise. (TX, p. 127).

Mr. McElroy admitted that though the peaks may be irrelevant for OSHA standards, the men in those particular areas were periodically exposed to noise levels that high for brief periods. (TX, p. 128). However, he again denied these brief exposures would matter. (TX, p. 129). Mr. McElroy agreed Claimant may have been exposed to these same noise levels without protection in 1975,[8] but

---

[7] Mr. McElroy described 85 dB as the "OSHA cut-off point." (TX, p. 119).

[8] Mr. McElroy admitted that his opinion that Claimant could have been exposed to similar levels in 1975 was speculation based on other witnesses statements that the tools used had not

he continued to assert such exposures were insignificant. (TX, p. 129). He also asserted that the design of the fab shop, with two open ends, two side doors, and a high roof allows most noise to dissipate quickly. (TX, p. 130). Mr. McElroy added that, if Claimant had worked outside of the shop as he testified, he was probably exposed to even lower levels of noise. (TX, p. 133).

B. Audiograms

Claimant described his hearing before Avondale as "pretty good." (TX, p. 14). He noticed his hearing was declining before he left Avondale the first time. (TX, pp. 22, 44, 67). However, Claimant never consulted a physician regarding this perceived hearing loss. (TX, p. 22). Claimant thinks his hearing is still declining, and has worsened since leaving Avondale. (TX, p. 70). Claimant denied any off the job noise exposure, and did not serve in the military. (TX, p. 43; CX-1, p. 1).

Claimant was first tested by Mr. Daniel Bode in August 1992.[9] (CX-1, p. 1; TX, pp. 43, 69; EX-10, p. 6). Both parties agreed to stipulate during his deposition that Mr. Bode is an expert in audiology. (EX-10, p. 6). Claimant complained of difficulty hearing people speak, difficulty hearing on the phone, having to turn the volume on his television too loud, and occasional ringing in the ears. (CX-1, p. 1; EX-10, p. 9).

Mr. Bode's report states Claimant worked for Avondale from 1972-1991 as a laborer,[10] exposing him to the noise of chipping guns and hammering. (EX-10, pp. 9, 30). No information as to the daily amount of such noise exposure was provided, and Claimant did not specify the type of hammering he was describing. (EX-10, pp. 30, 35-36, 70). Claimant reported he did not wear hearing protection at Avondale. (CX-1, p. 1). Claimant did not discuss other locations where he worked and may have been exposed to chipping guns or hammers. (EX-10, pp. 34, 40). Mr. Bode said his conclusions might have changed if he had known Claimant's full employment history, "because the exposure was there for all of them, and each of the environments would have potentially been hazardous to his hearing." (EX-10, p. 40). Mr. Bode said in his experience, noise exposure in shipyards is "pretty hazardous" due to the chippers, grinders, and hammers used. (EX-10, pp. 41-42).

A cursory physical exam found no excessive cerumen build-up. (CX-1, p. 1). Mr. Bode tested Claimant using a "Frye 3100" audiometer, and a sound treated enclosure. (CX-1, p.1; EX-10, p. 10). Mr. Bode said all equipment had been calibrated. (CX-1, p. 1; EX-10, p. 10). Pure tone air conduction tests revealed a bilateral mild to profound sloping hearing loss; bone conduction testing

---

really changed and the work was of the same type. (TX, pp. 133-34).

[9] Mr. Bode is a certified audiologist, licensed to practice in both Louisiana and Mississippi. (See CX-1, pp. 5-6 (C.V. of Mr. Daniel Bode)).

[10] From the court's review of Mr. Bode's records (Bode 1, attached to EX-10), it appears that this information was either recorded incorrectly, or misinterpreted by Mr. Bode. The court is persuaded that Claimant's work history discussed previously is correct.

corroborated that the loss was sensorineural. (CX-1, p. 1; EX-10, p. 10). Speech discrimination was rated as fair in the left ear and good in the right, confirming Claimant has better hearing in his right ear than the left. (CX-1, p. 1; EX-10, pp. 11-12). Based on the testing, Mr. Bode felt it likely Claimant's hearing loss was noise induced, even though the actual amounts of loss did not appear symmetrical as would be expected from a strict noise induced loss. (CX-1, p. 1; EX-10, p. 12). However, because of the similarity between the air and bone conduction results, Mr. Bode did not feel there was any evidence of a conductive loss. (EX-10, p. 12). Mr. Bode's report concluded Claimant had a 22.5 percent impairment in his right ear, a 46.9 percent impairment in the left ear, or 26.6 percent binaural impairment. (CX-1, p. 1; EX-10, p. 13). Mr. Bode recommended hearing aids. (EX-10, p. 13).

Mr. Bode was unable to explain the difference between the results in the ears. He agreed that normally noise induced hearing loss is symmetrical on testing. (EX-10, pp. 28-29). Mr. Bode felt the symmetrical high frequency loss indicated noise exposure, but he could not explain the difference between the results at 1000 kHz, at least not based on the information he possessed. (EX-10, p. 74). In Mr. Bode's experience, asymmetrical results such as Claimant's can usually be traced to a previous trauma more to one side (either actual physical trauma, or simply having one ear closer to a metal plate when it was struck). (EX-10, pp. 25, 74). However, Mr. Bode said he has no evidence to substantiate any trauma[11] which could account for the difference. (EX-10, pp. 26-28).

Mr. Bode felt the type and amount of hearing loss Claimant suffered was probably caused by long-term noise exposure, not intermittent noise exposure. (EX-10, p. 31). Mr. Bode explained he was not suggesting that intermittent exposure to high noise levels could not be injurious; he said changes in hearing can occur when dB levels reach between 110 and 120 dB. (EX-10, p. 33). He also stated that any noise over 90dB is considered hazardous, and guidelines suggest protection be worn at that level of noise. (EX-10, p. 33). Mr. Bode also seemed to agree that a person intermittently exposed to bursts of noise over 100dB, even over a short period, would probably show some injury. (EX-10, pp. 33-34, 39).

Claimant was evaluated by Mr. Bode for hearing aids on March 8, 1999; his report was issued March 12, 1999. (CX-1, p. 3; EX-10, pp. 7-9). Mr. Bode performed an additional audiogram on that date which showed only minor changes from the original, mostly within an expected range of error (plus or minus five dB). (CX-1, p. 3; EX-10, pp. 21-23, 50). The same differences between impairment levels in the right and left ears were again noted. (EX-10, p. 29). Speech reception and discrimination testing again showed Claimant's hearing better on the right. (CX-1, p. 3).

Mr. Bode recommended hearing aids, which Claimant said he would wear if provided. (TX, pp. 43-44). Mr. Bode evaluated three different types of aids: linear, programmable, and digital. (CX-1, p. 3; EX-10, p. 13). Testing was done using a calibrated audio computer presentation. (EX-10, p. 16). Mr. Bode found all three types of aids produced similar results in a quiet environment, but

---

[11] There is a note in Mr. Bode's records that Claimant had suffered two "extreme accidents," but no further explanation was given. (EX-10, pp. 27-28, 43, 72-73).

the programmable and digital aids functioned better in a noisy environment. (EX-10, p. 13; CX-1, p.3). Mr. Bode's report also notes Claimant was able to discriminate sounds and words much better with a programmable or digital aid (92 and 94 percent success, respectively) than with the linear (72 percent success). (CX-1, p. 3EX-10, pp. 71, 75, 77). This is because the programmable and digital aids contain circuitry to reduce background noise. (EX-10, p. 76).

Mr. Bode recommended the programmable aid as providing the best results at the least cost. (EX-10, p. 14). He estimated a quality programmable aid would cost $1,600.00 to $1,800.00 for each aid for a "half-shell" model.[12] (EX-10, pp. 16-18, 51). Mr. Bode said there would be only minor cost savings (less than $200 per aid, before discounts) associated with a slightly larger "in-the-ear" of full-shell aid, and he said this larger style often causes fitting problems, and may make it difficult for the wearer to use a telephone (although accommodations could be made for telephone use). (EX-10, pp. 19-20, 52-53, 58). Mr. Bode agreed there was no audiological reason Claimant could not wear a larger (and cheaper) aid, but he said a smaller style is more "efficient" and allows better amplification/sound reproduction. (EX-10, pp. 54-55, 58). Mr. Bode also said his recommendation against a "full-shell" model was not strictly cosmetic; he explained it is more efficient to place the hearing aid closer to the patient's ear drum. (EX-10, p. 68). Mr. Bode recommended a model made by a company known as Audio D instead of aids from some other companies, due to concerns about these other companies corporate health or cost. (EX-10, pp. 56-57).

Mr. Bode said he would not recommend the less expensive linear aids (with automatic gain control) because he could not adjust them to match the particular frequency losses Claimant suffered. (EX-10, pp. 14, 58-59). Although Mr. Bode admitted many hearing loss patients receive this type of linear aid, he said this is primarily a result of cost concerns; a set of linear aids costs only about $1,500.00 total. (EX-10, pp. 60, 62). If a linear aid is used, Mr. Bode said it will take him longer to get a proper fit and adjustment. (EX-10, p. 60). Although he conceded he probably would be able to return Claimant's ability to hear to a reasonable level with the linear aids, Mr. Bode still recommended the programable models because he is able to provide a better benefit to the patient with a programmable aid. (EX-10, pp. 60-61)

DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which

[12] This price includes a dispensing fee, (usually) a two-year warranty (including adjustments and modifications), and initial batteries. (EX-10, p. 20). This price also reflects 20 percent discount through the National Ear Care Plan, which utilizes group purchasing to offer reduced prices. (EX-10, pp. 57, 62-64).

resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994).

It is also well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467 (1968).

I. Jurisdiction

For a claim to be covered under the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, or that his injury occurred on a landward area covered by Section 3(a) of the Act and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 15 BRBS 62 (CRT)(1983); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 11 BRBS 320 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Therefore, for coverage to exist, a claimant must satisfy both "situs" and "status" requirements under the Act. See generally, Perini, 459 U.S. 297, 15 BRBS 62 (CRT) (1983).

The parties have not addressed jurisdiction in their briefs, nor listed it as a disputed issue. However, based on the evidence presented, the court is persuaded that LHWCA jurisdiction is proper in this matter. Based on the uncontradicted testimony of Claimant, he worked for Avondale building ships in its shipyard, and was exposed to the noise of chippers, grinders, and other tools at that site. (See generally, TX, pp. 13-21; CX-3, EX-3 (Claimant's Avondale Personnel file)).

II. Claimant's Prima Facie Case

A. Section 20(a) Presumption of Causation

Section 20(a) of the Act creates a rebuttable presumption that a claimant's disabling condition is causally related to his employment. In order to invoke this presumption, Claimant must prove that he suffered a harm or injury and that the conditions existed or an accident occurred at work that could have caused, aggravated or accelerated the harm or injury. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

1. Harm or Injury

Avondale does not dispute that Claimant suffered a hearing loss. (See Avondale's Post-Trial Brief, p. 5). In addition, Claimant has demonstrated that he suffered hearing loss through his own testimony and the audiological testing of Mr. Bode. (TX, pp. 22, 44, 67; CX-1, pp. 1-2; EX-10, p. 9). Therefore, the court concludes that Claimant has successfully demonstrated that he suffered a harm or injury under the Act.

2. Accident Occurred or Conditions Existed

Next, Claimant must establish that conditions existed or an accident occurred which could have caused, aggravated, or accelerated the harm. Avondale does not dispute that Claimant was exposed to some noise while working at Avondale, but it argues there is no proof to substantiate that the noise Claimant was exposed to was injurious. (See Avondale's Post-Trial Brief, p. 5). Claimant relies on his own testimony that he was exposed to the noise of chippers and grinders. (TX, pp. 14, 70-71). Claimant also testified that he was exposed to other types of noise, including noise from the use of mauls and from other types of machinery. (TX, pp. 18, 20-21). Claimant testified he was never provided hearing protection during the time he worked for Avondale. (TX, p. 21). In addition, Mr. Bode concluded that Claimant's hearing loss was a result of long term noise exposure. (CX-1, p. 1; EX-10, p. 31).

The court is persuaded that Claimant has satisfied the second element of his burden under Section 20(a), by demonstrating that conditions existed at Avondale which could have caused, aggravated, or accelerated the harm. Although Avondale is correct that no corroborating testimony of the conditions at Avondale was in introduced by Claimant, the court finds Claimant credible and his testimony persuasive. In addition, the court notes that Claimant need only establish that conditions existed which could have caused the harm.

As the court has found that Claimant has established a harm or injury and that working conditions existed which could have caused, aggravated, or accelerated the harm, Claimant is entitled to the Section 20(a) presumption linking the harm or injury to his employment at Avondale.

B. Avondale's Rebuttal

Once the Section 20(a) presumption is successfully invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co., v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996). Employer must produce facts, not mere speculation, to overcome the presumption of compensability. The presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the

connection between the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.T.E., et. al., 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, it is the proponent (Claimant) who has the burden of proof. Director, OWCP v. Greenwich Colleries, 114 S.Ct. 2251, 28 BRBS 42 (CRT) (1994).

Avondale argued there is no proof that Claimant was exposed to injurious noise levels while in Avondale's employ. However, once the Section 20(a) presumption is established, as above, the burden shifts to Avondale to disprove the presumed connection between Claimant's injury and the conditions of his employment. Avondale has failed to present any evidence to rebut. Avondale presented no noise studies (either current or historical) or contrary testimony from workers or supervisors regarding noise levels at Avondale's facility. Thus, the court concludes Avondale has failed to rebut Claimant's prima facie case, and therefore Claimant has established a link between his injury and employment.

However, Avondale may still escape liability by showing that even if it was responsible in some part for Claimant's injury, it was not the last responsible employer.

III. Last Responsible Employer

The last employer (or last maritime employer) rule previously held that the employer during the last covered employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment, should be liable for the full amount of the award. Travelers Insurance Co. v. Cardillo, 225 F. 2d 137, 145 (2d Cir. 1955); Cordero v. Triple A. Machine Shop, 580 F.2d 1331 (9th Cir. 1978); General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977). However, the BRB has fashioned a new version the Cardillo rule for hearing loss cases. Liability is imposed on "the last employer to expose claimant to injurious stimuli prior to the determinative audiogram and the filing of the claim." Good v. Ingalls Shipbuilding, 26 BRBS 159, 163-64 (1992); see also, Mauk v. Northwest Marine Iron Works, 25 BRBS 118, 125 (1991).

Claimant retired in 1991, his claim was filed in 1992, and audiograms were performed in 1992 and 1999. The parties seem to agree (at least, based on their arguments) that Claimant's last maritime employer to expose him to injurious stimuli is either Avondale, McDermott, or Main Iron. However, since there is no dispute that Avondale is the earliest employer of these three, and it has already been found to have exposed Claimant to injurious noise, Avondale has the burden to demonstrate that Claimant was exposed to injurious stimuli while performing work for a subsequent covered employer. See Avondale Indus. v. Director, OWCP, 977 F.2d 186, 190 (5th Cir. 1992).

A. Main Iron Works

1. Covered Employer

Claimant admits that Main Iron probably is a maritime site (and is thus presumably a covered employer). (See Claimant's Post-Trial Memorandum, p. 16). Avondale makes no separate argument in its brief that Main Iron is a covered employer, instead focusing on the injurious exposure inquiry.

The court is persuaded that the evidence shows Main Iron is a "covered employer." Although Claimant was unclear on what Main Iron produced, Mr. Molaison testified that Main Iron builds tugs and inland push boats, and its facility is located on the Intracoastal Waterway. (TX, p. 88). Thus the court concludes that Main Iron is a covered employer under the definition found in Section 2(4) of the Act. (See 33 U.S.C. § 902(4)).

2. Injurious Exposure

In trying to prove injurious nosie exposure at Main Iron, Avondale has primarily relied on the noise study conducted by Mr. McElroy in 1996. (See Avondale's Post-Trial Memorandum, p. 9). Although this study was conducted approximately 20 years after Claimant last worked for Main Iron, the court notes testimony that Main Iron employees were engaged in similar tasks using similar materials and tools during both time periods. (TX, pp. 94-96, 101, 104).

Avondale points out that in the fabrication shop near where Claimant said he worked, measured noise levels reached 105 dB. (See Avondale's Post-Trial Memorandum, p. 9; EX-5, p. 1). Other areas of the shipyard produced noise levels of up to 126 dB. (See Avondale's Post-Trial Memorandum, p. 9; EX-5, p. 1). Mr. Bode said that exposure to noise levels of 90 dB or greater requires hearing protection, and exposure to levels of 100 dB or higher could be injurious. (See Avondale's Post-Trial Memorandum, p. 9; EX-10, pp. 33-34). Mr. Bode also said that exposure to a noise level of 103 dB (measured as the noise caused by a welder chipping) once an hour, for eight hours a day, for two weeks, would be injurious. (See Avondale's Post-Trial Memorandum, p. 11). Based on Mr. McElroy's 1996 noise study, Avondale argues Claimant would have been exposed to noise levels of over 100 dB for at least brief periods of time. (See Avondale's Post-Trial Memorandum, p. 10).

Claimant disagrees there was any proof of injurious noise exposure in 1975. (See Claimant's Post-Trial Memorandum, p. 16). Claimant testified that Main Iron was "the quietest place I worked" (TX, p. 67), and Mr. Molaison agreed that there was not really any noise in the shipyard. (TX, p. 103). Both Claimant and Mr. Molaison agreed that the area he claimed he worked in (outside the fabrication shop) was one of the quieter areas of the shipyard. (TX, pp. 28, 103).

Based on the record, the court concludes Avondale has failed to establish that Claimant was exposed to injurious levels of noise while working for Main. Mr. McElroy's testing did reveal a peak noise level of 105 dB in the fabrication shop when within 25 feet of operating equipment (EX-5, p.1), but Claimant testified he worked outside, approximately 20 feet away from the building, usually with

no one else around him. (TX, pp. 27, 64). The court notes the testimony of Mr. Guidry that his crew primarily worked inside of the fabrication shop, but he could not recall Claimant specifically, and said he would have no reason to doubt Claimant's testimony that he worked outside. (TX, pp. 108, 115).

In addition, despite Avondale's carefully crafted hypothetical to Mr. Bode about being exposed to chipping once an hour, for eight hours a day over a two week period (EX-10, pp. 33-34), there is no indication that Claimant actually was exposed to these peak noise levels at that interval. Finally, the assumption that noise levels at Main Iron were exactly the same 20 years prior is just that, an assumption. Mr. McElroy admitted that the conclusion that noise levels were the same was speculation based on testimony that the methods, tools, and materials used were similar. (TX, pp. 133-34).

B. McDermott

1. Covered Employer

There is less evidence available concerning McDermott, and Claimant apparently worked at two separate McDermott facilities. Again, Claimant was uncertain as to the work performed at the "main yard," but Mr.Benoit testified this yard built "big offshore structures or platforms." (TX, pp. 32-33, 46; TX, pp. 74-75). Claimant was also unsure about the type of work done at the "Bayou Black" yard, but Mr. Benoit testified this yard made modules for use aboard fixed oil platforms. (TX, pp. 76-77). Mr. Benoit also said this facility was located next to a navigable waterway, Bayou Black. (TX, p. 79).

After consideration, the court is not persuaded that McDermott was a covered employer under the definition found in Section 2(4) of the Act; at least, the court has not been persuaded by the evidence in the record. (See 33 U.S.C. § 902(4)). Based on the testimony, Claimant worked building modules or parts of "big offshore structures or platforms," not boats, barges, or even special purpose vessels. Although these yards were located adjacent to navigable waterways, this is irrelevant if Claimant and the other employees were not engaged in the construction, repair, or loading/unloading of vessels, or any other kind of covered employment. Finally, although the various modules were eventually placed onto barges for movement to their final destinations, Claimant specifically denied ever participating in such activity, and Mr. Benoit merely admitted that "some" structural fitters engaged in this activity. Mr. Benoit had no knowledge of Claimant ever participating in a loadout. (See 33 U.S.C. § 902(4)).

Therefore, the court concludes that Claimant's work for McDermott was not work for a "covered employer," and therefore Avondale can not shift liability under the Act to McDermott. There is no need to address whether Claimant was exposed to injurious noise.

IV. Damages

A. Compensation

The uncontradicted report of Mr. Bode shows that Claimant had a 26.6% binaural hearing loss in 1992. (CX-1, p. 1) Therefore Claimant is entitled to (26.6% x 200 weeks) 53.2 weeks of compensation at a rate of ($173.60 x 66%) $115.73, or a total of $6,156.84, in accordance with Section 908(c)(13) of the Act.

B. Hearing Aids

Section 7(a) of the Act provides: "employer shall furnish such medical, surgical, and other attendance or treatment ... and apparatus, for such period as the nature fo the injury or the process of recovery may require." However, the employer is only obligated to pay for "reasonable and necessary" medical expenses. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). The important question left for the court is to decide what type of hearing aid Claimant should be provided.

Based on the evidence presented, particularly the audiograms and evaluation of Mr. Bode, the court finds Claimant is in need of hearing aids. Mr. Bode performed a hearing aid evaluation of Claimant on March 8, 1999 and evaluated three different types of aids: linear, programmable, and digital. (CX-1, p. 3; EX-10, p. 13). Mr. Bode felt all three types performed equally well in a relatively quiet environment, but the programmable and digital aids were better in a noisy environment, allowing better discrimination. (EX-10, p. 13).

Although Mr. Bode felt that the programmable aid would provide the best balance of cost and performance, he estimated the cost for this type to be $1,600.00 to $1,800.00 per aid for a half-shell or "in the canal model." (EX-10, pp. 16-18, 51). A larger "in the ear" model would provide cost savings of about $200 per aid, retail, but might cause fitting problems and interfere with telephone usage. However, Mr. Bode admitted accommodations could be made to provide benefits to Claimant using either the larger "in the ear" programmable, or the cheaper linear aids (with automatic gain control).

Although Mr. Bode feels the programmable aids would be a better choice for Claimant, the court does not feel that this more expensive type is "reasonable and necessary," given Mr. Bode's statements that he could still provide improved hearing for Claimant using the linear aids for approximately $1,500.00 per set. Based on Mr. Bode's testimony, for the additional cost of programmable aids, Claimant would only gain a moderate improvement in his ability to discriminate sounds and speech (72% success with a linear aid, 92% with a programmable), and would see no real improvement in results in a relatively quiet environment.

However, the cost savings for the larger full-shell or "in the ear" models are balanced out by the benefits of the smaller half-shell or "in the canal" models. Mr. Bode said the full shell model causes additional fitting difficulties, is less efficient overall, and can interfere with telephone usage. Based on the price sheet provided by Mr. Bode, this larger model would only save slightly more than

$100 per set (prior to discounts), over the smaller and more efficient half-shell or "in the canal" model. (CX-1, p. 4). This price sheet shows that (prior to discounts) a single linear aid (with automatic gain control) costs $790.00 for a full-shell model, $841.00 for a half-shell model, and $976.00 for the canal model. Based on the advantages of the smaller style described by Mr. Bode, the court feels that the slight cost increase for a smaller style is reasonable.

Therefore, the court finds that the half-shell or "in the canal" linear hearing aids (with automatic gain control) are reasonable and necessary.

ORDER

1. Employer shall pay Claimant compensation for a 26.6.% binaural hearing loss at a compensation rate of $115.73 per week for 53.2 weeks (26.6% x 200 weeks = 53.2 weeks) in accordance with Section 908(c)(13) of the Act;

2. Employer shall pay interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director;

3. Pursuant to Section 7 of the Act, Employer shall pay for all of Claimant's reasonable and necessary medical expenses arising out of his hearing loss disability, particularly a set of hearing aids as discussed above;

4. Claimant's counsel, Frank Bruno, shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel for Employer. Thereafter, Employer shall have 20 days from receipt of the fee petition in which to respond to the petition.

So ORDERED.

_____

RICHARD D. MILLS
Administrative Law Judge

RDM/bc